Supreme Court, U. S.
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No. 80-89

In the
Supreme Court of the United States
OCTOBER TERM, 1980

LEAK REPAIRS, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY IN SUPPORT OF PETTITION FOR CERTIORARI

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It is obvious that the Board does not want the Court to settle the controversy between the circuits as to whether the Court's *Mt. Healthy* and *Givhan* rationale or rule of causation for determining whether a termination of employment was for valid reasons or was to discourage civil or constitutionally protected rights should apply to Labor Act cases.

The Brief in Opposition asserts the questions presented by the Petition for Certiorari really do not exist because the Board and the Seventh Circuit held that the "real reason" for the discharges of Jenkins and Paver was their desire that the branch be unionized. This is

lifting by bootstraps. It does not answer the question as to how the conclusion, one way or the other, should be reached. The Brief asks the Court to accept appellate counsels' *post hoc* rationalizations as a basis for needlessly perpetuating sharp conflict and uncertainty in this troubled area—a strategy viewed with disfavor by the Court. *NLRB* v. *Metropolitan Ins. Co.,* 380 U.S. 438, 443, 444 (1965).

The brief writers would almost have the Court believe the Seventh Circuit did not realize the difference between its "in part" or "tained" motive doctrine and the "but for" test. That is a disservice to the Seventh Circuit and to this Court. The Seventh Circuit knew precisely what it was doing and tartly said that the "but for" rule of *Mt. Healthy* did not apply in the Seventh Circuit. (See Pet. 30 a) The Seventh Circuit relied heavily upon its 1980 decision of *Chicago Magnesium Castings Company* v. *NLRB,* 612 Fed. 2d 1028, which referred to the First Circuit's "but for" *Eastern Smelting* decision and said the "but for" standard was not "endorsed" by the Seventh Circuit. (612 F. 2d at 1034) Both Judges Cummings and Bauer sat on the panels in that and this case, with Judge Cummings writing the opinion in *Chicago Magnesium.* The Seventh Circuit knew what it was doing here and deliberately announced that it was not going to follow those circuits which held that *Mt. Healthy* required application of the "but for" rule to Labor Act cases.

The Brief in Opposition is but a glib collection of outworn shibboleths ("pretextual" for example), and factual assertions that in no event are going to be settled in this Court. It has no substance and is simply an effort to

forestall decision by the Court on a question which the director of the Board's Office of Appeals has said must be resolved here.[1] (See Pet. p. 16, n. 9)

Respectfully submitted,

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August 29, 1980

[1] Mr. Robert E. Allen, now Acting Associate General Counsel, whose name, strangely enough, appears on the Brief in Opposition.